STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 5, 2013
v	Nos. 308639; 309330 Wayne Circuit Court
WILLIE HARPER, Defendant-Appellant.	LC Nos. 10-011140-FC; 10-010259-FH

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In Docket No. 308639, defendant appeals as of right his jury trial convictions of three counts of assault with intent to murder, MCL 750.83, three counts of assault with intent to do great bodily harm less than murder, MCL 750.84,[1] carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent terms of 25 to 50 years for each count of assault with intent to murder, 5 to 10 years for each count of assault with intent to do great bodily harm less than murder, 40 to 60 months for carrying a concealed weapon, 40 to 60 months for felon in possession of a firearm, and a consecutive term of two years for felony-firearm. We affirm in part, but remand for correction of defendant's judgment of sentence to reflect that he was not convicted of three counts of assault with intent to do great bodily harm less than murder.

In Docket No. 309330, defendant appeals by leave granted his no contest plea of felonious assault, MCL 750.82, and felony-firearm, MCL 750.227b. Defendant was sentenced to consecutive sentences of one to four years for felonious assault and two years for felony-firearm, although these sentences were to run concurrent with Docket No. 308639. The trial court ordered defendant to pay $68 in state costs per conviction, $130 for the crime victim's rights fee, $600 in court costs, and $400 in attorney fees.

[1] As will be discussed *infra*, the judgment of sentence incorrectly reflects that defendant was convicted of assault with intent to do great bodily harm less than murder.

We affirm defendant's convictions and sentences in both dockets but remand for the trial court to correct the judgment of sentence to reflect that defendant was not convicted of assault with intent to do great bodily harm less than murder in Docket No. 308639.

I. FACTUAL BACKGROUND

In Docket No. 308639, defendant appeals as of right his convictions resulting from his shooting at three individuals at an apartment complex in Detroit, Michigan. Michael Clemons and Kevin Miller were with Steven Tee standing behind a gate and near a brick wall near the front of the apartment complex. Clemons and Miller saw a truck drive by with the passenger side facing the complex. Clemons identified defendant as driving the vehicle. The car briefly stopped, and defendant looked over at the three men. Defendant then continued down the road, made a u-turn over the sidewalk, drove back toward the apartment building, and stopped in front of the gate with the driver's side facing the complex.

Defendant then extended a semi-automatic gun out of the window. Clemons testified that defendant said, "[Y]aw thought I was playing and I told you I will be right back." Miller never saw the shooter's face, but testified that the shooter pulled out a gun and said, "I told you I would be back." Clemons saw defendant point the gun at him, Tee, and Miller, and start shooting through the gate. Miller dropped to the ground while Tee and Clemons ran. Clemons and Miller heard the bullets hitting the concrete and bricks of the building. When running, Clemons looked back to see where defendant was located. Defendant then looked directly at Clemons, shot two more times, and hit Clemons in the forehead with one of the bullets. Brandon Bunch, a resident of the apartment complex, testified and confirmed that Clemons had been shot in the head and had a slight wound. Bunch also testified that before defendant drove away from the scene, he said "I'll be back."

Two police officers noticed defendant driving at a high rate of speed and disregard a stop sign. They pursued him and saw that he threw an assault weapon out of the window. Defendant continued to flee from the police but when he attempted to turn left, he was unsuccessful, and his car struck a fence. Defendant ran out of the car and began fleeing on foot. He was eventually subdued and arrested, and the gun he threw out of the window was recovered. In a written statement to the police, defendant admitted that he was at the apartment complex because he had been robbed by four males two days before the shooting, but he claimed that he only shot the gun in the air and ran from the police because he had the gun. Clemons and Miller testified that they never saw defendant point his gun and fire it in the air. Clemons later went to the hospital and received staples and stitches for the bullet wound.

The police arrived at the apartment complex and collected nine casings on the sidewalk immediately next to the front gate. A firearm and tool mark examiner for the Michigan State Police testified that the nine fired cartridge cases were fired from the gun defendant threw from his car. There were six bullet impact marks on the front gate, which appeared to be new because there were paint chips on the ground and the bare metal was not rusted. Clemons and Miller did not notice bullet marks on the gate before the shooting. Defendant produced a witness at trial, however, who testified that he visited the apartment complex everyday and that the holes in the gate were there before the shooting.

Shavonte Rice, testifying on the behalf of the defense, claimed that she was at the apartment complex at the time of the shooting and saw the shooter point and fire the gun in the air. She claimed that she never saw the shooter point the gun straight ahead. Lana Rice, also testifying on behalf of the defense, claimed that she was there when the shooting started and saw an individual trip over a step to the entrance of the building, hitting his head on the concrete step. Clemons, however, was called as a rebuttal witness and testified that he did not trip and hit his head on the cement, and his head wound was caused by a gunshot. There was a trail of blood that led from the west door of the building to the end of a hallway in the apartment complex.

In Docket No. 309330, defendant appeals by leaved granted his plea of no contest to felonious assault and felony-firearm relating to his behavior in pursuing a female victim with a gun.[2] The trial court ordered defendant to pay $68 in state costs per conviction, $130 for the crime victim's rights fee, $600 in court costs, and $400 in attorney fees. Defendant now appeals in both dockets on several grounds.

II. RELEVANCY

A. Standard of Review

In Docket No. 308639, defendant contends that the trial court abused its discretion in ruling that photographs of the side of the apartment complex were inadmissible. We review a "trial court's evidentiary ruling for an abuse of discretion." *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). An abuse of discretion occurs when the trial court chooses a result that is outside the range of reasonable and principled outcomes. *Id*. We review de novo questions of law. *Id*.

B. Analysis

"[R]elevant evidence is admissible unless excluded by the state or federal constitution or by a rule of evidence." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010); MRE 402. Pursuant to MRE 401, relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* 236-237. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* at 237; MRE 403. When weighing the probative value against prejudicial effect, the court may consider the time required to present the evidence, "whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

[2] The facts underlying these convictions will not be discussed in this opinion as they are not relevant to the issues on appeal.

The trial court in the instant case did not abuse its discretion in excluding photographs purportedly showing bullet holes in the side of the apartment building. Because defendant did not deny firing the weapon, the sole issue at trial was whether he fired the gun in the air or at Clemons, Miller, and Tee. The police recovered nine casings that were immediately next to the front gate, which matched the semi-automatic gun that defendant threw from his car window during the subsequent police chase. There were six bullet impact marks on the front gate. The firearm and tool mark examiner testified that the marks appeared to be newer because there were paint chips on the ground and the bare metal was not rusted. Defendant attempted to rebut this claim by introducing photographs of bullet holes in the side of the apartment building, in an attempt to establish that shootings in the area were common.

However, whether shootings were common in that area was not at issue and did not relate to the elements of the charged crimes. Photographs of alleged bullet holes at a different location on the building, from nearly a year after the shooting, had no bearing on whether the evidence collected in this case was connected to defendant. In other words, whether there had at one time been a shooting at a different part of the building did not make it any more or less probable that defendant shot his gun in this case with the intent to murder Clemons, Miller, and Tee. See MRE 401; *Schaw*, 288 Mich App at 236-237.

Moreover, even if the photographs were minimally relevant, the danger of unfair prejudice substantially outweighed any probative value. There was no dispute that the shooting in this case occurred at the front of the apartment complex. Yet, these photographs showed a different part of the apartment building and were taken approximately a year after the shooting. There was a danger that the jury may have been confused by what the photographs were purportedly showing and give the evidence undue or preemptive weight. See *Blackston*, 481 Mich at 462 ("[u]nfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence."). Thus, the trial court did not abuse its discretion in excluding the photographs.[3]

III. LESSER INCLUDED OFFENSE

Also in Docket No. 308639, defendant challenges his convictions and sentences for three counts of assault with intent to do great bodily harm less than murder. Defendant is correct that the jury never convicted him of these counts. The jury found defendant guilty of three counts of assault with intent to murder, not of the lesser offense of assault with intent to do great bodily harm less than murder. Therefore, we remand for the limited task of correcting defendant's judgment of sentence to reflect that he was not convicted of, and should not be sentenced for, assault with intent to do great bodily harm less than murder.

IV. OFFENSIVE VARIABLE (OV) 6

[3] Even if these photographs were admissible, any error in excluding them was harmless beyond a reasonable doubt. MCR 2.613. Because other witnesses testified that shootings in the area were common, defendant was able to present his theory to the jury and there is no basis to conclude that the photographs would have altered the jury's verdict.

A. Standard of Review

In Docket No. 308639, defendant argues that the trial court erred in assessing 50 points under OV 6 because there was no finding of a premeditated intent to kill Clemons, Miller, and Tee. We review a "trial court's scoring of a sentencing guidelines variable for clear error." *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). We review de novo the interpretation and application of the legislative sentencing guidelines. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009).

B. Analysis

MCL 777.36, in relevant part, states that a trial court may score OV 6 at 50 points if defendant "had premeditated intent to kill." It also states that the "sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury." MCL 777.36(2)(1). "Premeditation, which requires sufficient time to permit the defendant to take a second look, may be inferred from the circumstances surrounding the killing." *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000). Relevant factors include the prior relationship of the parties, a defendant's actions before the assault, the circumstances of the assault itself, and a defendant's conduct after the assault. *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008).

While defendant argues that a finding of premeditation was inconsistent with the jury's verdict of assault with intent to murder, he cites no published authority for that proposition. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (it is not enough for an appellant to announce his claim and leave it to this Court to "search for authority either to sustain or reject his position.").[4] Further, there was ample evidence of premeditation. Defendant admitted to the police that he was at the apartment complex at the time of the shooting because he had recently been the victim of an alleged robbery. Defendant drove by the apartment building and looked in the direction of the victims. He then turned around and stopped in front of the gate with the driver's side facing the complex. He extended a semi-automatic weapon out of the window and stated, "yaw thought I was playing and I told you I will be right back." Defendant then fired multiple gunshots at Clemons, Miller, and Tee, one of which struck Clemons in the head. According to Clemons, defendant looked directly at him before firing two shots, one of which struck Clemons in the forehead. Considering these circumstances, there was sufficient evidence that defendant planned this attack and had sufficient time to take a second look. See *Coy*, 243 Mich App at 315. Accordingly, the trial court's finding of premeditation and corresponding score of 50 points under OV 6 was not in error.[5]

[4] Moreover, as the prosecution notes, we have repeatedly upheld a score of 50 points under OV 6 for assault with intent to murder convictions, albeit in unpublished cases. We find nothing inherently inconsistent with a finding that defendant had the intent to kill and that it was premeditated.

[5] We decline to address defendant's statements regarding OV 2 because he expressly acknowledges that in light of our ruling on OV 6, he is not entitled to resentencing

V. COURT COSTS

A. Standard of Review

In Docket No. 309330, defendant argues that the trial court erred in imposing court costs because the record did not demonstrate a relationship between the ordered amount and the costs of prosecuting him.[6] For an issue to be properly preserved for appellate review, it must be raised, addressed, and decided by the trial court. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Because defendant failed to raise this issue below, it is unpreserved. We review unpreserved claims for plain error affecting defendant's substantial rights. *People v Jones*, 297 Mich App 80, 83; 823 NW2d 312 (2012). "Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial." *Id.*

B. Analysis

"A trial court may require a convicted felon to pay costs only where such requirement is expressly authorized by statute." *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). MCL 769.1k and MCL 769.34(6) expressly grant authority to a sentencing court to order a defendant to pay "court costs." *People v Lloyd*, 284 Mich App 703, 709-710; 774 NW2d 347 (2009). MCL 769.1k states that "if a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial the defendant is guilty" then the court may impose "[a]ny cost in addition to the minimum state costs set forth in subdivision (a)." Defendant also cites MCL 769.34(6), which states that "[a]s part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments." Because the issue in this case is the imposition of court costs, not the imposition of costs of the prosecution, "there must be a reasonable relationship between costs imposed and the actual costs incurred by the trial court." *People v Sanders*, 296 Mich App 710, 714; 825 NW2d 87 (2012).[7]

Defendant contends that the trial court erred in considering general overhead in its imposition of court costs. However, defendant cites nothing in the record to substantiate his claim that the trial court considered the prosecution's overhead including salary and office

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[6] While defendant references a $1,000 fee, that was comprised of $600 in "court costs" and $400 in "attorney fees." Because defendant focuses on "court costs" without offering any arguments specific to the attorney fee portion, we decline to address that portion of the fee. See *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (quotation marks and citation omitted) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

[7] Contrary to defendant's claim, nothing in the record indicates that the $600 imposed by the trial court was for "prosecution costs," seeing as the court specifically referred to "court costs." Thus, defendants arguments based on *People v Dilworth*, 291 Mich App 399, 401; 804 NW2d 788 (2011), are distinguishable. See *Sanders*, 296 Mich App at 714 ("*Dilworth* considered imposing the costs of the prosecution and not court costs under [MCL 769.1k.]").

expenses. Furthermore, this Court has recognized then when imposing costs pursuant to MCL 769.1k, the statute does not "preclude the consideration of the court's 'overhead costs' in determining the costs figure." *Sanders*, 296 Mich App at 714; see also *People v Cunningham (After Remand)*, __Mich App__; __NW2d__ (Docket No. 309277, issued May 28, 2013) (slip op at 1, 2).[8]

Defendant also suggests that the trial court erred in failing to provide a detailed account for the $600 assessment. However, we have held that "the costs figure does not need to be particularized in each individual case[.]" *Sanders*, 296 Mich App at 715; see also *Cunningham*, __ Mich at __ (slip op at 2) (a "sentencing court [may] impose reasonable costs against an offender without separately calculating the particular costs of the offender's case."). This is true regardless of how quickly the case is resolved. *People v Sanders (After Remand)*, 298 Mich App 105, 107; 825 NW2d 376 (2012). Moreover, we decline defendant's invitation to remand this case for an evidentiary hearing. This alternate relief is unnecessary as we have already determined that even a $1,000 in another circuit court is reasonably related to the cost of conducting a felony case, *People v Jones*, __Mich App__; __NW2d__ (Docket Nos. 309303 and 310314, issued April 25, 2013) (slip op at 3-4), and we have upheld a $600 fee in a Wayne Circuit Court case under MCL 769.1k, see *Sanders*, 296 Mich App at 715 (recognizing that a $600 court costs assessment was upheld in *Lloyd, supra*, which was a Wayne Circuit Court case).

VI. CRIME VICTIM'S RIGHTS ASSESSMENT

A. Standard of Review

In Docket No. 309330, defendant contends that requiring him to pay the $130 under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, violated the ex post facto constitutional clauses because the crimes were committed before the Michigan Legislature increased the fee from $60 to $130. "Because defendant failed to raise this issue below, it is unpreserved and our review is limited to plain error affecting defendant's substantial rights." *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012) lv gtd 828 NW2d 359 (2013).

B. Analysis

We have already addressed this issue in *Earl, supra*. This Court has held that the imposition of the increased CVRA fee for offenses committed before the law's effective date "is not a violation of the ex post facto constitutional clauses." *Earl*, 297 Mich App at 114. Thus, the trial court's order that defendant pay $130 under CVRA was not a violation of the ex post facto clauses. Defendant asks us to hold this case in abeyance, as the Michigan Supreme Court has granted leave to appeal in *Earl*. However, defendant has not filed a motion to hold this appeal in abeyance and we note that "a Supreme Court order granting leave to appeal does not

[8] Likewise, while defendant cites an unpublished case stating that a court may not assess "jury costs," the trial court here never stated that it was imposing "jury costs." Also, defendant's arguments concerning restitution cases that rely on different language in other statutes are unavailing.

diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2). Thus, we decline to hold this appeal in abeyance.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

In both Docket Nos. 308639 and 309330, defendant alleges several instances of ineffective assistance of counsel. Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. Analysis

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant first must establish that "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012) (quotation marks and citation omitted). Second, the defendant must show that trial counsel's deficient performance prejudiced his defense in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 669 (quotation marks and citation omitted).

First, defendant claims that he was denied the effective assistance of counsel in Docket No. 309330 because his trial counsel failed to object at sentencing to the imposition of the court costs and the CVRA fee. However, as discussed above, there was no error in the imposition of these costs. Therefore, any objection would have been futile, and defense counsel is not ineffective for failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Because there was no error, we decline to remand for an evidentiary hearing.

Next, in his Standard 4 brief in Docket No. 308639, defendant raises several grounds of alleged ineffective assistance of counsel. First, he contends that his counsel did not object to Tee's failure to testify at trial, which constituted ineffective assistance because this was a violation of the confrontation clause. However, defendant fails to explain or cite any authority for the proposition that a violation of the confrontation clause results when a person does not testify at trial and no statements from that person are admitted at trial. See *Kevorkian*, 248 Mich App at 389 ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or

reject his position.").[9] Thus, defendant has failed to establish that he was denied the effective assistance of counsel or that remanding for an evidentiary hearing is necessary.

Next, defendant asserts that defense counsel provided ineffective assistance for failing to produce the radiologist to testify regarding the radiologist report, which referred to a bullet fragment in Clemons' laceration. While defendant contends that counsel's behavior was objectively unreasonable because the radiologist could have explicated further about the alleged bullet fragment, there is no evidence to suggest that the radiologist would have testified favorably for defendant. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) ("decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight. Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.") (quotation marks, citation, footnotes, and brackets omitted). Moreover, it may have been that trial counsel did not want to emphasize the radiologist report to the jury, which is sound trial strategy. See, e.g., *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995) (stating that there are times when it is better not to object and draw attention to unfavorable evidence); *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212, 220 (2008). Thus, defendant has not demonstrated that his counsel behaved objectively unreasonable or that the result of the trial would have been different.

Defendant also contends that he was denied the effective assistance of counsel when his counsel failed to object to the admission of medical records, which were admitted in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). However, defendant has failed to produce any evidence or relevant arguments that a *Brady* violation occurred. Defendant has offered no arguments or evidence that he "did not possess the evidence nor could [he] have obtained it with any reasonable diligence; . . . that the prosecution suppressed the favorable evidence; [or] that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). There is no basis to conclude that a *Brady* violation occurred or that defense counsel was ineffective for failing to raise this issue below. Defendant was not denied the effective assistance of counsel and remanding for a hearing is unwarranted.

Defendant also claims that his counsel provided ineffective assistance of counsel for failing to object to the prosecution's knowing use of perjured testimony. The disputed testimony is that of Miller, who testified at trial that defendant pointed the gun "straight ahead straight." Miller testified at the preliminary examination that defendant did not aim the gun at anyone. Defendant claims that these two versions of events are inconsistent and constituted perjury, which the prosecution knew of and to which defense counsel did not object.

However, defendant fails to point out that at the preliminary examination Miller also testified that defendant pointed the gun "[s]traight, straight out the window." Thus, Miller's testimony at the preliminary examination and at trial was consistent, as he continually stated that

[9] This same analysis applies to defendant's arguments about Dr. Janowitz's failure to testify. Defendant also failed to explain the relevancy of the medical record in this part of his argument.

defendant pointed the gun straight out of the window, not up in the air. Moreover, defendant has failed to produce any evidence that the prosecution offered what it knew to be untruthful testimony. Defendant's argument also overlooks that defense counsel raised the issue of Miller's preliminary examination testimony during cross-examination at trial. Defense counsel confronted Miller with his prior testimony about defendant not aiming the gun at anyone, thus highlighting the perceived discrepancy and credibility issue. Therefore, defendant has failed to demonstrate that his counsel behaved objectively unreasonably or that any perceived error prejudiced him.

Defendant next argues in his Standard 4 brief that because his counsel was denied a continuance and had not adequately prepared, defendant was deprived of the effective assistance of counsel pursuant to *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), and his counsel's behavior failed the test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).[10] Defendant's argument conflates *Cronic* and *Strickland*, and fails to establish grounds for relief under either.

As the Michigan Supreme Court held in *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), the standard articulated in *Cronic* is for three "rare situations in which the attorney's performance is so deficient that prejudice is presumed."[11] Not only does defendant fail to identify these three circumstances, he offers no argument for why any of them applied to this case. See *Kevorkian*, 248 Mich App at 389 (an appellant may not simply assert an error and leave it to this Court to unravel and elaborate his arguments and then search for supporting authority).

Likewise regarding defendant's arguments based on *Strickland*, we note that test is met when counsel's performance is objectively unreasonable and prejudice resulted. However, *Strickland* is implicated when a defendant offers "specific" instances of defense counsel errors. *Frazier*, 478 Mich at 244-245. Here, even if a continuance was denied, defendant offers no specific instances where his counsel faltered at trial. Thus, defendant has failed to establish that he was denied the effective assistance of counsel or that remanding for an evidentiary hearing is warranted.[12]

VIII. INSUFFICIENT EVIDENCE

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[10] We note that defendant failed to produce any citation to the record to indicate when this alleged denial of the continuance occurred, which violates MCR 7.212(C).

[11] The three situations are when: there is a complete denial of counsel; counsel entirely failed to subject the prosecution's case to meaningful adversarial testing; and where counsel is called upon to render assistance under circumstances where competent counsel could not. *Frazier*, 478 Mich at 243, 243 n 10.

[12] Moreover, while defendant argues that the trial court abused its discretion in failing to grant a continuance, any alleged error would be harmless beyond a reasonable doubt. MCR 2.613. Defense counsel offered a zealous defense, as he thoroughly cross-examined the prosecution's witnesses and offered several defense witnesses to refute the prosecution's theory of events.

A. Standard of Review

In defendant's Standard 4 brief in Docket No. 308639, he argues that there was insufficient evidence to support his convictions for three counts of assault with intent to murder. "Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). This Court reviews "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Unger*, 278 Mich App at 222.

B. Analysis

"The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Ericksen*, 288 Mich App at 195-196 (quotation marks and citation omitted). Defendant argues that there was insufficient evidence to support his convictions because Miller testified at the preliminary examination that defendant did not aim the gun at anyone; Tee did not testify; Clemons and Miller had "conflicting and inconsisting testimonies [sic]" and some of their testimony was hearsay; apartment resident Brandon Bunch's testimony at trial varied from his statement to the police; police officer David Haines testified that they found no bullets or strike marks; the holes in the fence were not at a height that proves defendant shot the gun from his car; and the medical physician did not testify about the medical records.

Defendant fails to address how this litany of complaints implicates the sufficiency of the evidence, and fails even to address the elements of assault with intent to commit murder. See *Kevorkian*, 248 Mich App at 389 (an appellant may not simply assert an error and leave it to this Court to elaborate his claims and search for authority to support them).

Moreover, a review of the evidence demonstrates that there was sufficient evidence to support defendant's conviction. Defendant drove to the apartment complex with a gun because he had been robbed at that location a couple days prior. He drove by the three victims, paused, and looked in their direction. He then made a u-turn and drove on the sidewalk until he was near the victims. He stated, "yaw thought I was playing and I told you I will be right back." He then fired multiple shots in the victims' direction, hitting one of them in the forehead. Clemons testified that before defendant shot him in the forehead, defendant looked directly at him and deliberately fired two more shots.

Thus, there was sufficient evidence that defendant committed an assault, he had the intent to kill, and the killing would have been a murder. *Ericksen*, 288 Mich at 195-196. While there was conflicting evidence about whether defendant shot the bullets up in the air, all conflicts in the evidence are resolved in favor of the prosecution and we will not second-guess the jury's

determinations regarding the weight or credibility of the evidence. *Unger*, 278 Mich App at 222. Therefore, we find that defendant's convictions were supported by legally sufficient evidence.[13]

IX. PROSECUTORIAL MISCONDUCT

A. Standard of Review

Lastly, in defendant's Standard 4 brief in Docket No. 308639, he contends that there was prosecutorial misconduct. An unpreserved claim is reviewed only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). An error must have occurred, it must be plain, and it must have affected the outcome of the proceedings. *Id.*

B. Analysis

Defendant first attacks the prosecution's statements in closing argument that the jury should not believe the defense witnesses. However, the prosecution specifically stated that the jury should not believe these witnesses because there was no evidence that they were even present at the shooting. A prosecutor is allowed to present "arguments from the facts and testimony that the witnesses at issue were credible or worthy of belief." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). The prosecutor did not imply that she had some type of special knowledge regarding the witnesses' credibility. *Id.*

Moreover, while the prosecution did comment on a defense witness's credibility regarding the pictures she took at the apartment building, this again was an argument derived from the evidence. The prosecution noted that this witness did not see shots being fired and the pictures were not taken at the time of the crime, so this witness lacked credibility and her testimony should be given little weight. Because these comments were arguments based on the evidence at trial, they were proper. *Dobek*, 274 Mich App at 66.

Finally, the jury was specifically instructed that the prosecution's statements were not evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not established any plain error requiring reversal.

X. CONCLUSION

We affirm defendant's convictions and sentences but remand for the limited task of correcting his judgment of sentence to reflect that he was not convicted of assault with intent to do great bodily harm less than murder. We have reviewed any further arguments that defendant

[13] For these same reasons, we find no error in the trial court's ruling on the sufficiency of the evidence in the context of the directed verdict. Moreover, while defendant alleges that there was "hearsay" admitted at trial, he fails to specifically identify, explain, or support this allegation.

raises and find them to be without merit and undeserving of remanding for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Michael J. Riordan